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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 31

AMERICAN UNITED MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

CITY OF AVON PARK, FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. PLEUS,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 814

AMERICAN UNITED MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

CITY OF AVON PARK, FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

Reference to Opinion of Court Below

The opinion of the Circuit Court of Appeals rendered January 31, 1940 has now been reported in 108 F. (2) 1010.

II

Statement as to Grounds of Jurisdiction

It is admitted the Court has power to grant the writ, but the question of propriety in so doing is strenuously urged:

The decision of the Circuit Court of Appeals is not a final judgment or decision, but is merely an affirmance of an interlocutory decree. The Statute (Bankruptcy Act, Chapter IX, 58 Stat. 653, 11 U. S. C. 401, et seq.) is plain:

Section 83 (e) provides specifically for the District Court to "enter an interlocutory decree confirming the plan". Section 83 (f) makes such interlocutory decree binding only when and if the consideration to be delivered to creditors under the terms of the plan shall be made available for the creditors, and provides that "thereupon the Court shall enter a final decree * * *." Section 83 (g) makes a certified copy of only the final decree evidence of jurisdiction, regularity of the proceedings and the fact that the decree or order was made.

That the District Court merely entered an interlocutory decree is obvious from the record (R. 237), and jurisdiction was specifically retained (R. 251).

The appeal to the Circuit Court of Appeals was solely and only from "the Interlocutory Decree entered herein June 19, 1939" (R. 252).

And to clinch the proposition, counsel for Petitioner (Brief, page 25) asks this Court to take jurisdiction, as otherwise "the District Court would proceed to final decree * * *."

There is nothing in the record or the petition and supporting brief to make of this an extraordinary case, taking it out of the well-established rule, consistently adhered to by this Court, that the power to issue writs of certiorari to review interlocutory decrees or orders is to be exercised only in "extraordinary cases", and the fact of a non-final judgment is, of itself, sufficient ground for the denial of the writ.

As stated in *American Construction Company vs. Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372, 13 Sup. Ct. 758, 37 L. Ed. 486:

> "Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

To like effect, see:

The Conqueror, 166 U. S. 110, 113, 17 S. Ct. 510, 41 L. Ed. 937;

Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280, 284, 17 S. Ct. 572, 41 L. Ed. 1004;

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 258, 36 S. Ct. 269, 60 L. Ed. 629;

City and County of Denver vs. New York Trust Co., 229 U. S. 123, 133, 33 S. Ct. 657, 57 L. Ed. 1101;

Hanover Star Milling Co. vs. Metcalf, 240 U. S. 403, 408, 409, 36 S. Ct. 357, 60 L. Ed. 713;

The Three Friends, 166 U. S. 1, 49, 17 S. Ct. 495, 41 L. E. 897.

III

Statement of Case

We merely list the following corrections of inaccurate statements contained in the Petition:

(a) R. E. Crummer & Company was neither organized by The Brown-Crummer Investment Company, nor was it organized exclusively for the purpose of representing clients of the latter company (R. 193).

(b) At no time, whether prior to or subsequent to July 17, 1937 did the two corporations named either own or rep-

resent a substantial portion of the bonds of the City of Avon Park, which were then outstanding—the record is that a substantial portion of the bonds now owned by these companies were acquired prior to July, 1937 (R. 169).

(c) The Fiscal Agent was not appointed as such "to effect a refunding" of the indebtedness of the City; rather, it was solely and only on its part to "endeavor to accomplish a refunding, by a par for par exchange * * *." In other words, it was a "best-efforts" contract.

(d) The contract in no manner required R. E. Crummer & Company to perform any of the services as listed on page 2 of the petition, but merely provided that it would "defray all expenses incident to" such services (R. 35).

(e) The record is utterly silent that the proceedings in bankruptcy were initiated at the instance of the Fiscal Agent, but rather the same were initiated by proper action of the governing authority of the City involved (R. 39).

(f) The record is likewise utterly silent that the Fiscal Agent managed, controlled or performed any official function whatsoever of the City.

(g) The option given creditors did not call for a purchase by the Fiscal Agent at "one-third of their value" of claims representing interest accruals (Petition, page 4), but rather at one-third of their *face* value—two entirely different criteria of value.

(h) The "profit", which the Fiscal Agent receives, is nothing more than compensation duly and properly allowed in accordance with Chapter IX of the Bankruptcy Act.

IV
ARGUMENT

Three errors are assigned and will be answered in order:

1. That the decision of the Circut Court of Appeals is contrary to the law of Florida, as announced by the Supreme Court of that state in Taylor vs. Williams, decided February 23, 1940, and found reprinted on pages 9 to 19 of the petition.

It should be sufficient to advise the Court that this is not a final decision by the Supreme Court of Florida, but is now resting on rehearing, petitions for such rehearing having been filed by all parties to the litigation.

Secondly, the Taylor case involved a county and not a city and the specific distinction was made by the Supreme Court of Florida (Petition, page 12).

The Taylor case did not hold the contract illegal or void, nor that under such contract was the Fiscal Agent "managing or controlling any of the official functions involved in the issuing of refunding bonds."

The Taylor case did hold that such Agent could be employed "for services in no wise official in their nature", and could be compensated therefor.

The contract with the City of Avon Park is not an integral part of the plan, the Agent is not called upon to perform any official duties of the City, but merely defrays certain expenses.

The Taylor case did not enjoin the issuance of any refunding bonds, but, on the contrary, the opening statement (Petition, pages 9 and 10) shows that it was merely to enjoin the levy and collection of taxes, and that it was not a bond validation suit. The concluding sentence of the Court likewise makes the distinction (Petition, page 19).

No part of the Fiscal Agent's commission in these proceedings is to be paid by the unit, the District Court found the same to be reasonable in accordance with the Statute allow-

ing it so to do, and to apportion the same "among the parties to the proceeding as may be just". (Chapter IX, Section 83 [b])

2. *That the decision of the Circuit Court of Appeals is contrary to applicable decisions of this Court.*

It should be enough to point out that no such decisions of this Court are cited.

3. *That the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the decision of this Court in Case vs. Los Angeles Lumber Co.*, 84 L. Ed 22 (Adv. Sheet).

The theory of petitioner's argument is that because the Circuit Court of Appeals relied upon its own decision in the case of *Vallette vs. City of Vero Beach*, 104 F. (2) 59, Cert. Den. 84 L. Ed. 87 (Adv. Sheet), it impliedly reaffirmed its holding in such case that the consent of the vast majority of creditors to the composition strongly supported the action of the District Judge; and that such consent is no proof that the plan is fair and equitable under the decision of this Court in *Case vs. Los Angeles Lumber Company*, supra. Of course, if the Circuit Court of Appeals held no such thing in the Vero Beach case, the predicate for the argument falls. The language used by that Court in such case is unambiguous:

> "The vote of the creditors upon the plan does not at all bind the Judge in finally allowing compensation."

Thus, the Court followed exactly the rule announced in the Los Angeles Lumber Company case, supra. It is significant also that no element of unfairness is seriously argued.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

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